

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, DC 20554

**ORIGINAL**

In the Matter of )  
 )  
 Mescalero Apache Telecom Inc. )  
 GTE Southwest Incorporated )  
 and )  
 Valor Telecommunications of )  
 New Mexico, LLC )  
 )  
 Joint Petition for Waiver of the Definition of )  
 "Study Area" Contained in Part 36, Appendix- )  
 Glossary of the Commission's Rules )  
 )  
 Mescalero Apache Telecom Inc. )  
 )  
 Related Waivers of Parts 36, 54, 61 and 69 of the )  
 Commission's Rules )  
 )

File No. \_\_\_\_\_

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**JOINT PETITION FOR EXPEDITED WAIVER**

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## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	2
STANDARD FOR WAIVER .....	4
PUBLIC INTEREST STATEMENT .....	5
I.    THE COMMISSION SHOULD WAIVE ITS STUDY AREA FREEZE.....	7
A. The Mescalero Transaction Does Not Adversely Impact The USF.....	9
B. The New Mexico State Corporation Commission Does Not Object To Changing the Study Area Boundaries. ....	10
C. Grant Of This Petition For Waiver Of Study Area Will Serve The Public Interest.....	10
II.   THE COMMISSION SHOULD WAIVE SECTION 54.305 OF ITS RULES TO ENSURE ADEQUATE RECOVERY OF MESCALERO’S COSTS .....	11
III.  THE COMMISSION SHOULD WAIVE SECTIONS 36.611 AND 36.612 OF ITS RULES TO ENABLE MESCALERO IMMEDIATELY TO RECEIVE UNIVERSAL SERVICE FUND PAYMENTS.....	12
IV.  THE COMMISSION SHOULD WAIVE SECTION 69.3(e)(11) OF ITS RULES TO THE EXTENT NECESSARY FOR MESCALERO TO UTILIZE NECA AS ITS TARIFF POOL ADMINISTRATOR. ....	16
V.   THE COMMISSION SHOULD PERMIT MESCALERO TO OPERATE UNDER RATE OF RETURN REGULATION SUBSEQUENT TO ITS PURCHASE OF THE EXCHANGE.....	17
A. Grant of the Requested Waiver Will Not Permit Mescalero, GTE or Valor to Engage in Cost-shifting or Gaming. ....	17
B. Grant of the Waiver Will Serve the Public Interest .....	19
CONCLUSION.....	19

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**JOINT PETITION FOR EXPEDITED WAIVER**

GTE Southwest Incorporated (“GTE”), Valor Telecommunications of New Mexico, LLC (“Valor”) and Mescalero Apache Telecom Inc. (“Mescalero”), a corporation organized under the laws of the Mescalero Apache Tribe (collectively, the “Petitioners”), hereby request a waiver of the definition of “Study Area” contained in Part 36 of the Commission’s rules to effectuate the sale of the local telephone exchange (the “Exchange”) serving the Mescalero Apache Reservation and the Ski Apache area (collectively, the “Reservation”) from GTE/Valor to Mescalero. In addition, Mescalero further seeks related waivers of Parts 36, 54, 61 and 69 of the Commission’s rules.

## INTRODUCTION AND SUMMARY

In an Asset Purchase Agreement dated February 17, 2000, GTE agreed to sell and Mescalero, a new local exchange carrier ("LEC") wholly-owned and operated by the Mescalero Apache Tribe (the "Tribe"), agreed to purchase the Exchange. The Exchange consists of approximately 950 customer access lines serving the Reservation. These lines currently are served from GTE's Mescalero, Alto, and Ruidoso exchanges. Mescalero's service area will be the Reservation which encompasses approximately 463,000 acres of land in the northeast portion of Otero County in southern New Mexico. In addition, the service area will include the "Ski Apache area," which adjoins the reservation on its northern border.<sup>1</sup>

Although Mescalero has a separate agreement with GTE, the Exchange also is included in the transfer from GTE to Valor, filed with the Commission on March 9, 2000.<sup>2</sup> GTE's transaction with Valor will close prior to the GTE/Mescalero transaction. As a result, GTE's entire study area in New Mexico will be transferred to Valor at that time and GTE will have no further interest in this Petition. Subsequent to the GTE/Valor closing, the Exchange will be transferred from Valor to Mescalero upon Mescalero receiving final state and federal approvals.<sup>3</sup> Valor will provide transitional telecommunications services to the residents of the Mescalero Apache Reservation during the period that Mescalero's applications are pending.

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<sup>1</sup> The Exchange and service area is shown in Exhibit A attached hereto.

<sup>2</sup> See *GTE Southwest Incorporated, Section 63.71 Application to Discontinue Local Exchange and Exchange Access Service in New Mexico*, Section 63.71 Application, File No. W-P-D-457 (filed Mar. 9, 2000).

<sup>3</sup> Because the GTE/Valor transaction involved GTE's entire New Mexico study area, no study area waiver request was filed or necessary for that transaction.

This Joint Petition for Expedited Waiver (“Petition”) seeks waivers of certain Commission rules and policies to permit Mescalero to establish a new study area consistent with its service area and operate as a rate-of-return regulated LEC, as well as to receive timely and sufficient universal service fund (“USF”) high-cost support to ensure Mescalero’s ability to provide high quality and affordable services to the Tribe and its members. Specifically, the Petitioners seek a waiver of the study area freeze permitting Valor to delete the Exchange from its New Mexico Study Area<sup>4</sup> and Mescalero to establish a new cost-based study area for the Reservation and the adjoining Ski Apache Area. In addition, Mescalero seeks a waiver of Section 54.305, the Commission’s per line cap on high-cost funds, permitting Mescalero to obtain high-cost funding based upon the average cost of its own access lines, rather than the average costs of GTE or Valor.

Mescalero also seeks a waiver of Sections 36.611 and 36.612 of the Commission’s rules to allow it immediately to begin receiving USF high-cost funding based upon current costs, rather than historical costs which will delay receipt of USF funding by up to two years and seriously harm Mescalero’s ability to serve the Tribe and its members.

Finally, Mescalero seeks waivers of Sections 61.41 and 69.3(e)(11), as necessary, of the Commission’s Rules, permitting Mescalero to be regulated as a rate of return carrier, rather than a price cap carrier, when it begins providing interstate telecommunication service, and enabling Mescalero to rely on the National Exchange Carrier Association, Inc. (“NECA”) as its tariff and universal service administrator.

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<sup>4</sup> As noted above, upon closing of the GTE/Valor transaction, Valor will acquire GTE’s entire study area in New Mexico.

GTE, Valor and Mescalero request expedited treatment of this Petition. As detailed below, a grant of the requests for waiver will serve the public interest. Moreover, this Petition is fully supported by Commission precedent and policy.

### **STANDARD FOR WAIVER**

Under Section 1.3 of the Commissions Rules, “any provision of the Commission’s rules may be waived by the Commission. . . or on petition if good cause therefore is shown.”<sup>5</sup> The Commission has read this rule to permit waivers where “particular facts would make strict compliance inconsistent with the public interest.”<sup>6</sup> As interpreted by the courts, this requires that a petitioner demonstrate that “special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest.”<sup>7</sup> As demonstrated below, the circumstances of this case warrant a waiver of the requested rules.

Moreover, the Commission’s responsibilities under the Federal Trust Doctrine further support the grant of the requested waivers. As a result of the unique government-to-government relationship between the Tribes and the Federal Government, the United States, and its agencies, have a fiduciary duty to protect the interests of the various tribes.<sup>8</sup> This principle of Indian law

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<sup>5</sup> 47 C.F.R. § 1.3.

<sup>6</sup> *Policies and Roles Concerning Operator Services Access and Pay Telephone Compensation*, 7 FCC Rcd 4355, 4364 n. 118 (1992).

<sup>7</sup> *ALLTEL Corporation*, 14 FCC Rcd 14191, 14201 (1999) (“ALLTEL Order”) (quoting *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2d 1164 (D.C. Cir. 1990)). See also, *Wait Radio v. FCC*, 418 F. 2d 1153, 1158 (D.C. Cir 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>8</sup> See e.g., *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935) (Governmental power to manage and control Indian property and affairs is not absolute, but is subject to limitation inherent in a guardianship).

“must apply with equal force in the area of telecommunications.”<sup>9</sup> Recently, the Commission explicitly recognized its trust responsibility and the rights of tribal governments to “set their own communications priorities and goals for the welfare of their membership.”<sup>10</sup> Of particular relevance to the issue of waiver of Commission rules, the Commission adopted the following goal:

The Commission will endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to telecommunications services.<sup>11</sup>

Thus, federal Indian law and corresponding FCC policy provides an additional basis under which this Commission must consider, and grant, the requested waivers.

#### **PUBLIC INTEREST STATEMENT**

The requests for waiver in this Petition serve the public interest and are consistent with the Commission’s recent efforts “to secure for consumers living on tribal lands the same opportunities to take advantage of telecommunications capabilities that other Americans have.”<sup>12</sup>

The Commission recognizes that:

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<sup>9</sup> *Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Further Notice of Proposed Rulemaking, CC Docket 96-45, at § 38 (Rel. Sept. 3, 2000) (“*Tribal Lands FNPRM*”).

<sup>10</sup> *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207, at 4 (rel. June 23, 2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Extending Wireless Telecommunications Services to Tribal Lands*, Notice of Proposed Rulemaking, FCC 99-205, ¶ 1 (1999) (“*Tribal Wireless NPRM*”).

[t]he relatively low incomes of most Indians on tribal lands and the rural (and, thus, generally high cost) environment of most tribal lands have produced extremely low telephone penetration rates - even compared to penetration levels for other Americans of similar economic status living in rural areas. Because telephone service is a necessity in our modern society, this lack of access to basic telecommunications services puts the Indian communities at a tremendous disadvantage.<sup>13</sup>

This statement applies to the situation on the Reservation. The Commission has a public interest, as well as a trust duty, to make an effort to support solutions to the problems identified.

Current telecommunications services to the Reservation do not meet the needs of the Tribe and its members, and do not reflect the kind of high-quality basic and advanced services available to society at large. The facilities on the Reservation are antiquated and in poor condition. Moreover, telecommunications services are available only in the higher density subscriber regions of the Reservation. Many tribal members, therefore, currently have no access to even basic telecommunications services.

Mescalero plans to upgrade significantly the facilities and services provided to customers on the Reservation. Using state-of-the-art digital switching, microwave and fiber optic facilities, Mescalero will provide affordable services that will rival services offered in any metropolitan area. The Commission's grant of the requested waivers will allow Mescalero to provide such vastly improved telecommunications services without requiring significant increases in basic service rates. Moreover, grant of the waivers is consistent with Congress's and the Commission's universal service goals. Mescalero will extend lines to unserved and underserved

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<sup>13</sup> *Id.* at ¶ 2.



residents in remote areas on the Reservation, but will not impose line extension charges on its customers.

Finally, as noted above, grant of the requested waivers will further the Commission's policy of promoting telecommunications services on tribal lands. The Telecommunications Act of 1996<sup>14</sup>, directs the Commission to devise methods to ensure that "consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas have access to telecommunications and information services at rates that are reasonably comparable to rates charged for similar services in urban areas."<sup>15</sup> Mescalero has proposed a solution to help meet this requirement and, therefore, grant of the waivers necessary to implement that solution is in the public interest.

#### **I. THE COMMISSION SHOULD WAIVE ITS STUDY AREA FREEZE.**

To effectuate the transfer of the Exchange to Mescalero, the Petitioners seek a waiver of the Commission's "study area freeze."<sup>16</sup> The Commission froze study area boundaries as of November 15, 1984.<sup>17</sup> The Commission hoped to "ensure that LECs [would] not set up high cost exchanges within their existing territories as separate study areas to maximize high cost

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<sup>14</sup> Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

<sup>15</sup> 47 U.S.C. § 254 (b) (3).

<sup>16</sup> As noted above, GTE joins in this request for waiver only to the extent that it currently holds the subject Exchange. Upon closing of the Valor/GTE transaction, GTE no longer shall be a petitioner in this proceeding.

<sup>17</sup> 47 C.F.R. § 36, Appendix - Glossary.

support.”<sup>18</sup> The Commission did not intend, however, to discourage carriers from acquiring high cost exchanges or expanding their current services to include high cost areas.<sup>19</sup> In fact, the Common Carrier Bureau has held that changes in study areas that result from arms-length purchases or sales of exchanges do not raise the concern that LECs will establish study area boundaries in a manner solely to maximize high cost support received from the USF.<sup>20</sup> The Commission has, therefore, in circumstances such as the one presented by the Petition, granted waivers of the study area freeze.

The Commission has established a three part test for study area waivers. The Commission will grant a request for a study area waiver if it determines that: (1) the change in study area boundaries will not adversely affect the USF support program; (2) the state

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<sup>18</sup> *US WEST Communications, Inc. and Eagle Telecommunications, Inc. Joint Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix - Glossary of the Commission’s Rules and Eagle Telecommunications, Inc. Petition for Waiver of Section 61.41(c) of the Commission’s Rules, Memorandum Opinion and Order*, 10 FCC Rcd 1771, 1773 ¶ 10 (1995) (citing *MTS and WATS Market Structure, Amendment of Part 67 of the Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, 50 Fed. Reg. 939 (Jan. 8, 1985)) (hereinafter, “US WEST/Eagle Order”).

<sup>19</sup> *MTS and WATS Market Structure, Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325, 48337 ¶ 65 (Dec. 12, 1984).

<sup>20</sup> *Contel of the West Petition for Waiver of Section 36.125(f), Sections 36.154(4)(1) and (2), and the Definition of “Study Area” contained in Part 36, Appendix - Glossary, of the Commission’s Rules, Oregon-Idaho Utilities, Inc. Petition for Waiver of the Definition of “Study Area” contained in Part 36, Appendix - Glossary, of the Commission’s Rules, Memorandum Opinion and Order*, 5 FCC Rcd 4570, 4571 ¶ 9 (1990).

commission having regulatory authority does not object to the change in study area boundaries; and (3) the public interest supports grant of the waiver.<sup>21</sup>

The Petition meets the Commission's requirements for a waiver of the study area freeze. Therefore, the Commission should grant the study area waiver and issue an order allowing Valor to remove the subject exchange from its New Mexico Study Area and allowing Mescalero to establish a new cost-based study area for the Reservation.

**A. The Mescalero Transaction Does Not Adversely Impact The USF.**

The proposed transaction would not adversely impact the USF. The Exchange serves a small population on the Reservation with a correspondingly limited increase in USF funding. As a general matter, the Petitioners calculate that Mescalero would receive an average additional \$1,790,000 in high-cost funding over its first 3 years of operation above the approximately \$28,884<sup>22</sup> GTE, and subsequently Valor, likely would receive to serve the subject service area during the same period.<sup>23</sup> Mescalero certifies that this change in universal service funding represents far less than one percent of the total USF and, therefore, does not constitute a significant impact on the USF or threaten unwarranted growth of the USF.<sup>24</sup>

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<sup>21</sup> See *USWEST/Eagle Order*, 10 FCC Rcd at 1772 ¶ 5.

<sup>22</sup> This estimated sum does not include any additional interstate access universal service funding that may be available to Valor in the future as a price cap carrier.

<sup>23</sup> As discussed below, in order to receive this additional high-cost funding, the Petitioners seek a waiver of Section 54.305 of the Commission's rules.

<sup>24</sup> See *Id* at 1774. Exhibit B attached hereto contains financial and USF projections for Mescalero in support of this request for waiver.

**B. The New Mexico State Corporation Commission Does Not Object To Changing the Study Area Boundaries.**

Mescalero has recently filed with the New Mexico Public Regulation Commission (“NMPRC”) a voluntary<sup>25</sup> application for a Certificate of Public Convenience and Necessity for the proposed purchase of the Exchange.<sup>26</sup> Mescalero attaches a copy of a letter from the NMPRC indicating that NMPRC does not object to the proposed changes in study area boundaries.<sup>27</sup> Mescalero will supply the Commission with a copy of the NMPRC’s action on Mescalero’s pending application as soon as it is available.<sup>28</sup>

**C. Grant Of This Petition For Waiver Of Study Area Will Serve The Public Interest.**

As discussed above, grant of the study area and related waivers will serve the public interest by ensuring improved services to the Tribe and its members, as well as enabling Mescalero to serve for the first time ever, Native Americans throughout the Reservation. Moreover, the Commission’s failure to grant this waiver request will harm the public. If the

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<sup>25</sup> Mescalero and the Tribe have determined that expeditious service to the Tribe and its members will best be served by Mescalero voluntarily accepting regulation by the NMPRC. If, however, the Tribe determines in the future to assert its regulatory authority over Mescalero, the company will become subject to Tribal regulation. This action by Mescalero does not constitute a waiver of tribal sovereign immunity.

<sup>26</sup> *Application of Mescalero Apache Telecom, Inc. for Certification of Financial and Technical Competency, Operating Authority, and Public Convenience and Necessity and For Approval of Initial Tariffs*, Application, Case No. 3364 (filed May 15, 2000).

<sup>27</sup> See Letter from John B. Hiatt, Chief of Staff of the New Mexico Public Regulation Commission to Irene Flannery, Chief, Accounting Policy Division, Federal Communications Commission, dated June 13, 2000.

<sup>28</sup> Because the NMPRC will not object to the study area waiver, the Petitioners request that the Commission expedite consideration of this Petition pending receipt of a final NMPRC’s action.

Exchange remains in Valor's New Mexico Study Area, future studies would reflect inaccurately the interstate costs incurred by Mescalero in serving its rural customers. Without a change to the study area boundaries, Mescalero's customers would be considered to be Valor subscribers for study area purposes. As a result, Mescalero would be required to charge rates based on inaccurate costs. This result is inconsistent with the Commission's principle of cost causation which long has been a hallmark of its cost recovery policy. Without receipt of the requested waivers, rural Native Americans will be denied the benefit of the Commission's universal service policies.<sup>29</sup>

## **II. THE COMMISSION SHOULD WAIVE SECTION 54.305 OF ITS RULES TO ENSURE ADEQUATE RECOVERY OF MESCALERO'S COSTS**

In order to receive the necessary high-cost funding to ensure that Native Americans on the Reservation have access to the same telecommunications services as other Americans, the Mescalero seeks a waiver of Section 54.305 of the Commission's rules. This rule states that carriers purchasing high cost exchanges receive the same level of support per line as the seller received prior to the sale.<sup>30</sup> The failure to grant a waiver of this rule will seriously jeopardize Mescalero's ability to fulfill its goal of providing high-quality basic and advanced telecommunications services to the Tribe and its people. In particular, Mescalero will be wholly unable to extend service to the unserved areas within the Reservation if it cannot receive USF

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<sup>29</sup> The Commission recognized in the *Tribal Lands FNPRM* that study areas defined by tribal boundaries might be necessary to ensure the appropriate targeting of high-cost funding. See *Tribal Lands FNPRM* at ¶ 64.

<sup>30</sup> 47 C.F.R. § 54.305.

support based upon the average cost of all of its lines, a policy concern that outweighs any concern over impact on the USF.<sup>31</sup> The Commission must not allow its universal service rules to stand as a barrier to the expansion and improvement of telecommunications services in Indian Country.

### **III. THE COMMISSION SHOULD WAIVE SECTIONS 36.611 AND 36.612 OF ITS RULES TO ENABLE MESCALERO IMMEDIATELY TO RECEIVE UNIVERSAL SERVICE FUND PAYMENTS**

Mescalero respectfully requests waiver of Sections 36.611 and 36.612 of the Commission's Rules<sup>32</sup> to enable Mescalero, as a new LEC serving formerly unserved and underserved areas of the Reservation, to receive USF payments immediately upon commencement of operations. Mescalero also requests that the Commission direct the Universal Service Administrative Company ("USAC") to disburse these payments consistent with this request. Granting such a waiver will permit Mescalero to provide, upgrade and extend reasonably-priced local phone service to previously unserved and underserved portions of the Reservation and is consistent with prior Commission decisions.<sup>33</sup>

Strict application of the Commission's rules would preclude Mescalero from receiving USF payments contemporaneously with the expenditure of funds in the crucial start-up phase of

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<sup>31</sup> In the *Tribal Lands FNPRM* the Commission recognized that the existing caps on the USF could serve as a barrier to extending service to unserved and underserved tribal areas. *Tribal Lands FNPRM* at ¶ 67.

<sup>32</sup> 47 C.F.R. § 1.3

<sup>33</sup> *Border to Border Communications, Inc.*, 10 FCC Rcd at 5056; *South Park Telephone Company*, 13 FCC Rcd at 203 (1997).

its operations. This anomaly would prevent full and timely recovery by Mescalero of its investment and expenses devoted to initiating critical services to unserved and underserved Native Americans.<sup>34</sup> Absent additional universal service support, Mescalero may face difficulties meeting Rural Utility Service (“RUS”) TIER requirements as well as meeting its construction and upgrade goals.<sup>35</sup>

In addition, failure to grant Mescalero’s request would place undue upward pressure on local rates. Absent waiver, Mescalero likely would have no choice but to impose substantial local rate increases on the rural low-income Native Americans who reside on the Reservation in order for Mescalero to recover costs associated with local service, or forego the proposed new and expanded improved services to the Mescalero Apache community. Higher local rates clearly would discourage subscription to local telephone service and jeopardize the future availability of service, a result completely inconsistent with the Commission’s goals.<sup>36</sup>

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<sup>34</sup> The data submission and filing requirements of Part 36 of the Commission’s Rules operate to postpone the eligibility of the newly-established LEC to receive USF support until its third year of operation. See, e.g., *Border to Border* at 5055; *South Park* at 198. In comments on the *Tribal Lands FNPRM*, the National Exchange Carrier Association (NECA) and the United States Telecom Association (USTA) explained the adverse effect of the “two-year lag rule.” NECA and USTA correctly recognized that carriers seeking to provide telephone service to previously unserved or underserved areas do not have proceeding year information Mescalero to submit to NECA for USF support calculations that reflect the current costs incurred to expand universal service. Right now, “[s]uch carriers are ... required to wait for up to two years following the time that they incur costs in serving these areas before they can receive high cost support.” *Comments of NECA and USTA* at 8.

<sup>35</sup> RUS requires that its borrowers maintain a Times Interest Earned Ratio (“TIER”) of 1.0. The TIER is expressed as (Net Operating Income + Interest Expense)/Interest.

<sup>36</sup> Moreover, local rate escalation is contrary to the fundamental goal of the USF program:

....Continued

Grant of the requested waiver is consistent with the Commission's decisions in *Border to Border* and *South Park*. Mescalero is in a similar situation as the carriers in those cases. Mescalero is a new company that will serve a previously unserved territory that would remain without service if Mescalero were unable to provide service.<sup>37</sup> In such circumstances, the Commission correctly noted that "the rules would have the unintended effect of discouraging service in a high cost area. . . . [and] may frustrate the Commission goal of promoting affordable service and thus may disserve the public interest."<sup>38</sup> Such is the case here as well. Grant of Mescalero's request for waiver would serve the public interest by ensuring that the funds necessary to provide and improve services in Indian Country are made available in a timely fashion.

Unlike the carriers in *South Park* and *Border to Border*, Mescalero also will serve areas of the Reservation that already receive some minimal level of telecommunications service. The logic and policy behind the *South Park* and *Border to Border* decisions apply, however, both in instances where a new carrier serves only formerly unserved areas and where the carrier serves both areas that have received service in the past and unserved areas. A contrary approach would

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Continued...

The Commission established the USF program to promote the nationwide availability of telephone service at reasonable rates. Toward this end, USF support permits high-cost LEC's to reduce local rates by recovering additional expenses from the interstate services they provide.

*Border to Border*, 10 FCC Rcd at 5055.

<sup>37</sup> See *South Park*, 13 FCC Rcd at 201.

<sup>38</sup> *Border to Border*, 10 FCC Rcd at 5057.



discourage companies from expanding services to unserved subscribers by depriving those carriers of the high-cost support payments necessary to make service to unserved areas possible. In the tribal context, the FCC would, in effect, be telling a tribal carrier that it may only serve unserved areas within the reservation boundaries if it is willing to forego USF funding for two years, an outcome certainly at odds with the FCC's goals with respect to tribal lands. Such a barrier to entry cannot be supported under FCC policy.

Because Mescalero does not have historical data with which to compute USF, Mescalero proposes to compute USF in the initial two years based on the estimated actual costs per access line. Mescalero also proposes to true up on an annual basis with USAC to reconcile any difference between estimated and actual costs incurred.

Waivers will permit immediate access to full USF funding to recoup Mescalero's substantial investment during its initial years of operation. Granting this waiver request will ensure administration of the USF in a manner consistent with the Commission's goal of assisting local exchange carriers serving high-cost areas in maintaining affordable local service rates.<sup>39</sup> Granting the request will also further the Commission's efforts to promote deployment and subscribership in unserved and underserved areas, including tribal areas.<sup>40</sup> Therefore, Mescalero urges the Commission to grant this request.

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<sup>39</sup> See generally, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

<sup>40</sup> See *Tribal Lands FNPRM*. See also *Tribal Wireless NPRM*.

**IV. THE COMMISSION SHOULD WAIVE SECTION 69.3(e)(11) OF ITS RULES TO THE EXTENT NECESSARY FOR Mescalero TO UTILIZE NECA AS ITS TARIFF POOL ADMINISTRATOR.**

Mescalero intends to utilize NECA as its interstate tariff administrator. Mescalero requests a waiver of Section 69.3(e)(1) to the extent that its individual “common line tariff participation” may be precluded until “the next annual access tariff filing effective date following the consummation or Mescalero of the merger or acquisition transaction.”<sup>41</sup>

A strict interpretation Section 69.3 (e) (11) would require Mescalero to separately file an interstate tariff, and assume the cost and associated administrative burden. Such a result is clearly not in the public interest. The Commission established NECA, in part, to ensure that the excessive burdens associated with tariffing would not be imposed upon small LECs such as Mescalero.<sup>42</sup> Such a burden should not be imposed upon Mescalero merely because of this proposed transaction. Rather, resources should be concentrated on providing high quality telecommunications services to the affected rural reservation areas.<sup>43</sup> Also, the financial impact upon the NECA pool that Mescalero seeks to join is anticipated to be minimal.<sup>44</sup>

Accordingly, since this transaction will not close prior to the time required for Mescalero to provide NECA with proper notice and in light of the administrative burden that would be

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<sup>41</sup> 47 CFR § 69.3 (e) (11).

<sup>42</sup> See 47 CFR § 69.603.

<sup>43</sup> See generally, *Small Company Order*, 2 FCC Rcd at 3811; see also *Small Company Optional Incentive Order*, 8 FCC Rcd at 4545.

<sup>44</sup> The access lines to be acquired represent an increase of significantly less than one percent of the total access lines within the NECA common line pool.

placed upon Mescalero in the absence of this request, Mescalero respectfully requests a waiver of Section 69.3(e)(11) to the extent necessary to become a NECA Issuing Carrier and to participate in the NECA pools upon the date of the closing of this acquisition.

**V. THE COMMISSION SHOULD PERMIT MESCALERO TO OPERATE UNDER RATE OF RETURN REGULATION SUBSEQUENT TO ITS PURCHASE OF THE EXCHANGE.**

The provisions of Section 61.41 of the Commission's rules, commonly referred to as the "all-or-nothing" rule, provide that when a non-price cap company acquires a price cap company, or any part thereof, the acquiring company becomes subject to price cap regulation.<sup>45</sup> GTE and Valor are subject to price cap regulation. In the context of the all-or-nothing rule, the Commission has recognized that "a ... waiver is justified if efficiencies created by the purchase and sale of [the] exchanges outweigh the threat that the transfer is designed to ... thwart the Commission's rules."<sup>46</sup> Mescalero seeks a waiver of Section 61.41 because its application in this case will not serve the purposes of the rule nor will it be in the public interest.

**A. Grant of the Requested Waiver Will Not Permit Mescalero GTE, or Valor to Engage in Cost-shifting or Gaming.**

The Commission's underlying rationale in establishing the all-or-nothing rule is not implicated in the current transaction, and waiver is, therefore, justified. This rule was designed

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<sup>45</sup> 47 C.F.R. § 61.41(c) (2).

<sup>46</sup> See e.g. *Petitions for Waivers Filed by San Carlos Apache Telecommunications Utility, Inc., and US West Communications, Inc.*, 11 FCC Rcd 14591, 14598 (1996) ("San Carlos Order"); *Kendall Telephone, Inc. and Wisconsin Bell, Inc.*, 13 FCC Rcd 17739, 17743 (1998) (citation omitted) ("Kendall Order").

to prevent anticompetitive behavior when a price cap and a rate of return company merge or one such company acquires the other. The Commission has held that:

[a]bsent such a rule, a company might attempt to shift costs from its rate of return affiliates allowing the rate of return affiliate to earn more (because of its greater revenue requirement) while generating greater earnings for the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Also, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could game the system by building up a large rate base under rate of return regulation, then opting for price caps which rewards carriers for making efficiency gains.”<sup>47</sup>

Where these concerns are not present, the Commission consistently has granted requests for waiver of Section 61.41(c), including instances where the acquiring entity was a tribally-owned carrier.<sup>48</sup>

The cost-shifting concern is not raised by this transaction. Mescalero is not seeking to maintain separate affiliates under different systems of regulation. Neither GTE, Valor nor Mescalero is pursuing this transaction “as a means to circumvent the Commission’s Rules”<sup>49</sup> As to the “gaming the system” concern, Mescalero has only a single operation and, therefore, can have no intent to convert any operation to price caps at this time. Moreover, it is unreasonable to consider that Valor might try to game the system by moving the Exchange back and forth

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<sup>47</sup> *ALLTEL Service Corporation*, 8 FCC Rcd 7054, 7054 (1998) (“ALLTEL Service Order”) (citing *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637, 2706 (1991)).

<sup>48</sup> See, e.g., *ALLTEL Order*; *ALLTEL Service Order*; *Columbine Telephone Company*, 12 FCC Rcd 3622 (1997); *Alpine Communications, L.C. et. al.*, 12 FCC Rcd 2367 (1997); *San Carlos Order*; *US West Communications, Inc.*, 10 FCC Rcd 1771 (1995); *Island Telephone Company*, 7 FCC Rcd 6382 (1992); *Chautauqua & Erie Telephone Corporation*, 7 FCC Rcd 6081 (1992); *US West Communications and Gila River Telecommunications, Inc.*, 7 FCC Rcd 2161 (1992).

<sup>49</sup> See *Kendall Order* at 17744.

between price cap and rate of return regulation because Valor is selling the Exchange. Therefore reacquisition of the Exchange would require a second study area waiver. Moreover, Valor cannot transfer the Exchange without removing the rate-increasing effects of the Exchange from the price-capped rates that have been based, in part, upon inclusion of the Exchange in its New Mexico study area. In sum, this waiver request presents none of the concerns that led the Commission to adopt the all-or-nothing rule.

#### **B. Grant of the Waiver Will Serve the Public Interest**

As explained above, the proposed transaction will serve the public interest. Therefore, the Commission should grant the requested waiver to prevent unnecessary accounting burdens being placed on Mescalero during its crucial startup phase.

### **CONCLUSION**

In his statement announcing the Commission's plan to modify the Commission's LifeLine program, Chairman Kennard noted that

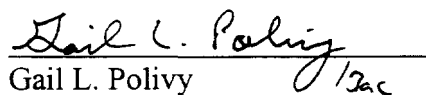
It is disgraceful that while we have a telephone system that is the envy of the world, basic telecommunications services are not widely enjoyed by our land's oldest people. Indians have among the lowest phone penetration rate of any demographic group in this country.<sup>50</sup>

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<sup>50</sup> News Release, *FCC Chairman and Commissioner Gloria Tristani Joined President Clinton in Announcing A Plan To Provide Local Phone Service for \$1 A Month in Indian Country* (Rel. Apr. 17, 2000).

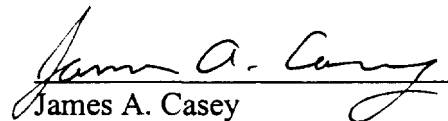
Mescalero is prepared to address the problems discussed by the Chairman for the Mescalero Apache community. To allow Mescalero to do so, and to meet its trust responsibilities to the Tribe, however, the Commission must grant the requested waivers. Therefore, the Petitioners respectfully request that the Commission expeditiously review and grant this Petition.

Respectfully submitted,

  
Gail L. Polivy

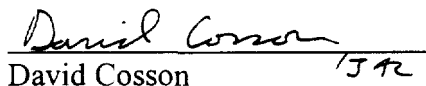
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